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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (App. 34–39) is reported at 442 F. 2d 504.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on April 29, 1971. A timely petition for rehearing was denied on June 23, 1971 (Pet. App. C). On September 16, 1971, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including October 21, 1971. The peti-

tion was filed on October 20, 1971, and was granted on January 17, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the owner of land taken by the United States is entitled to have included in the measure of his compensation the value of revocable grazing permits on adjoining federal land issued under an Act of Congress which specifies that such grazing permits create no "right, title, interest, or estate in or to the lands."

STATUTE INVOLVED

Section 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b, provides in pertinent part:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, * * * as under his rules and regulations are entitled to participate in the use of the range * * *. [T]he issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

STATEMENT

In order to obtain land for the construction of the Alamo Dam and Reservoir Project in Arizona, the United States brought this condemnation proceeding under the authority of the Declaration of Taking Act (46 Stat. 1421, 40 U.S.C. 258a), the Flood Control Acts (39 Stat. 950, as amended, 33 U.S.C. 701)

and Pub. L. 534, 78th Congress, to acquire title to 920 of 1,280 acres owned by the respondents. At the time of the taking the respondents grazed their cattle not only on their own lands, but also on 12,027 acres of land leased from the state and 31,461 acres of land belonging to the United States on which they held revocable grazing permits issued under the Taylor Grazing Act (App. 34–35; 442 F. 2d at 505–506). At trial, the respondents contended that since the highest and best use of their land was that of a cattle ranch, the permitted use of the public domain lands and state lands should be considered in determining the fair market value of their land. The United States contended that the government should not be required to compensate a landowner for value created by revocable permits issued by the government to the landowner for grazing on adjacent public lands.

In its pretrial order the district court, adopting the respondents' theory, ruled as follows (App. 13–14):

> If the highest and most profitable use to which the lands might be put is determined to be in connection with a cattle operation, then in that event the use of the lands in connection with adjacent public lands to which the defendant owners have access by way of federal permits or state leases shall be considered, provided consideration is also given to the possibility that the grazing permits or state leases might be withdrawn or canceled at any time without constitutional obligation to pay compensation therefor. *U.S.* v. *Jaramillo,* 190 F. 2d 300 [C.A. 10].

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At the trial, the respondents' witnesses testified that the land's highest and best use was as a cattle ranch utilizing the abundant, low-priced water on respondents' land for irrigation of that land and allowing the cattle to forage on the adjacent federal and state desert lands when forage was good there (App. 19, 21); that the ranch had a 1,200 cow-unit capacity,[1] based on the combination of privately owned and public domain land (App. 23; Tr. 329, 335–336); and that its capacity would be considerably smaller without forage on the government-owned land (*ibid.*). Mr. Fuller's own analysis supporting the use of his ranch as a "mother cow" operation was based upon the land's fine water, climate, soil and "* * * also * * * the availability of federal land, as well as state land" (App. 25).[2]

While sometimes purporting to value the ranch without regard to the loss of public domain land (*e.g.*, App. 21–22), respondents' witness consistently told the jury (as the court's pretrial ruling permitted) that the ranch including the public land was an enterprise operated as a whole (see App. 23–25).

The district court, adhering to respondents' theory, instructed the jury, over the government's objection,

[1] A "cow unit" is a mother cow and its calf, see App. 16.

[2] Our petition for certiorari presented no question with respect to respondents' use of state lands for grazing, and this Court accordingly need not be concerned with the nature of respondents' rights under state law to the use of those lands or the propriety of the district court's instructions relating thereto. If, however, a new trial is required as a result of this Court's decision, the district court may find it appropriate to revise its instructions concerning the state lands in light of the principles announced by this Court with respect to the federal lands.

that "such permits are mere licenses which may be revoked and are not compensable as such. However, [if you] should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land * * *" (App. 26–27). The jury returned a verdict of $350,000 for the 920 acres taken (App. 29).

The court of appeals affirmed, with one judge dissenting. The majority noted that in *United States* v. *Rands*, 389 U.S. 121, this Court held that the compensable value of riparian land did not include its special value as a port site on navigable water since the waters were the property of the Nation, but held that *Rands* is distinguishable primarily on the ground that, while the Taylor Grazing Act does not create any interest in the lands as such, "the government's control over Taylor Grazing Act lands is not the same as the absolute control enjoyed under the navigational servitude" (442 F.2d 506–508; App. 37–39). The dissenting judge was of the view that *Rands* controlled this case.

SUMMARY OF ARGUMENT

The Fifth Amendment requires compensation only for the taking of property rights, not for other values that may be lost such as business opportunities or the revocable licenses involved here. Congress may provide for compensation beyond that required by the Fifth Amendment but here it has not done so.

Indeed, Section 3 of the Taylor Grazing Act, under which the grazing permits here were issued, expressly provides that the issuance of a grazing permit does

not create a property right. Although such grazing permits undoubtedly are of considerable value, the courts have consistently held that under the Act the government may revoke them without incurring liability. And when Congress has wished cattlemen to receive compensation for the loss of grazing permits, as in the case of land taken for defense purposes, it has specifically so provided. Defense purposes are not involved in the present suit.

A fundamental principle of the federal law of eminent domain is that in arriving at a landowner's constitutionally guaranteed just compensation, the United States is not to be charged with values it has created. The anticipated availability of grazing licenses on public land is a value created by the government; to require the addition of this value to the value of the land expropriated as compensation when the government takes the adjacent land is tantamount to awarding compensation for the value of the public domain in contravention of the rule of *United States* v. *Rands,* 389 U.S. 121. There this Court held that the United States is not required to pay for the value as a port site of riparian land it has taken. The rationale of *Rands,* in which the government had only a dominant servitude, is *a fortiori* applicable where, as here, the government is proprietor and the private license is granted under a statute expressly excluding any private estate in public lands.

The opinion below, if allowed to stand, would penalize the government for postponing cancellation of grazing permits in areas where public projects are

planned from the date when the adjacent land is legally taken until that land is physically needed. As a result, the government would be encouraged to revoke permits before it is otherwise necessary to do so, notwithstanding possible hardships on the permittees and the policy of the Taylor Grazing Act to permit economic use of public lands. The policies of that Act will be better served by giving effect to the Act's declaration that grazing permits conferred under the Act create no property interest, and application of that provision will also prevent unwarranted compounding of the indirect subsidy Congress has provided by permitting grazing on public lands for very low fees.

ARGUMENT

I

REVOCABLE PERMITS TO USE PUBLIC LANDS FOR THE GRAZING OF PRIVATELY OWNED CATTLE ARE NOT COMPENSABLE PROPERTY RIGHTS WITHIN THE MEANING OF THE FIFTH AMENDMENT

A. *The Fifth Amendment requires compensation only for property taken, and not for other value that may be lost.*—It is an established principle of the law of eminent domain that the "existence of value alone does not generate interests protected by the Constitution against diminution by the Government * * *." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319. The government is required to pay only for property taken, "not for opportunities which the owner may lose" (*United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282), such as frustrated business opportunities (*Omnia Co.* v.

United States, 261 U.S. 502) or even the consequential destruction of a business (*Mitchell* v. *United States*, 267 U.S. 341).[4]

Accordingly, the compensation required to be paid is limited to the value of the condemnee's legal rights in the property taken, as this Court held in denying a claim for additional compensation for the lessees' renewal expectancy in a case where the tenants had "occupied their leaseholds by mutual consent for long periods of years * * *." *United States* v. *Petty Motor Co.*, 327 U.S. 372, 380. See also *Scully* v. *United States*, 409 F. 2d 1061 (C.A. 10), certiorari denied, 396 U.S. 876; *United States* v. *22.95 Acres in Whitman County, Washington* (*Almota Farmers Elevator and Warehouse Co.*), 450 F. 2d 125 (C.A. 9), petition for certiorari pending, No. 71-951. And a person using or occupying private property by virtue of a mere license or contracted right, without any legal interest in the land itself, is not entitled to compensation when the property is taken by condemnation. *Chicago, M. St. P. & P.R. Co.* v. *Chicago, R.I. & P. Ry. Co.*, 138 F. 2d 268 (C.A. 8), certiorari denied, 320 U.S. 804. Cf. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279.

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[4] See also *Joslin Co.* v. *Providence*, 262 U.S. 668, 675; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94–95; *Bothwell* v. *United States*, 254 U.S. 231, 233; *United States* v. *677.50 Acres in Marion County, Kan.* (*Clear Creek*), 420 F. 2d 1136 (C.A. 10), certiorari denied, 398 U.S. 928; *Stipe* v. *United States*, 337 F. 2d 818, 821–822 (C.A. 10); *Hooten* v. *United States*, 405 F. 2d 1167 (C.A. 5); *J. A. Tobin Construction Co.* v. *United States*, 343 F. 2d 422 (C.A. 10), certiorari denied, 382 U.S. 830; *R. J. Widen Company* v. *United States*, 357 F. 2d 988 (C. Cls.).

While, in any of these situations, Congress may, of course, provide for payment in excess of the just compensation that is constitutionally required (*Brown* v. *United States*, 263 U.S. 78; *United States* v. *Realty Co.*, 163 U.S. 427), it has not done so here.

B. *Section 3 of the Taylor Grazing Act expressly provides that the issuance of a grazing permit does not create a property right.* Prior to the creation of the National Forests in 1891,[5] ranchers in the West considered the use of public domain lands theirs for the taking.[6] The government did not object and the unregulated use of this public land for private profit became entrenched and led to range wars and destruction of large parts of the range through overgrazing. Cattlemen saw free use of the range as their inalienable right, but in *Buford* v. *Houtz*, 133 U.S. 320, 326, this Court ruled that such permissive occupancy conferred only an "implied license" to use the land so long as "no act of the government forbids its use." See also *Omaechevarria* v. *Idaho*, 246 U.S. 343, 352.

The Forest Service Organic Act[7] empowered the Secretary of Agriculture to regulate the "use and occupancy" of the national forests (which included considerable range land). When the Secretary

[5] 26 Stat. 1103, as amended, 16 U.S.C. 471.

[6] For a discussion of the history and economics of grazing rights on public lands see Kingery, *The Public Grazing Lands*, 43 Denv. Law. J. 329; Nielsen and Wennergren, *Public Policy and Grazing Fees on Federal Lands: Some Unresolved Issues*, 5 Land & Water Law Rev. 293.

[7] Act of June 4, 1897, 30 Stat. 11, 35, as amended, Act of Feb. 1, 1905, 33 Stat. 628, as amended, 16 U.S.C. 551.

began to require permits to graze livestock in the national forests cattlemen objected, but this Court upheld the right of the government to grant or deny access to its public domain lands on such terms as it saw fit, and rejected claims by grazers to a vested right in the use of those lands. *Light* v. *United States*, 220 U.S. 523; *United States* v. *Grimaud*, 220 U.S. 506; see also *Bell* v. *Apache Maid Cattle Co.*, 94 F. 2d 847 (C.A. 9).

Against this background, Congress, in enacting the Taylor Grazing Act of 1934 (48 Stat. 1269, as amended, 43 U.S.C. 315), carefully distinguished between a license to use the public land, and a leasehold interest in it. Section 15 of the Act, 43 U.S.C. 315m, authorizes leases of public lands for grazing purposes, but only if the land is not suitable for inclusion in a grazing district to be established under other provisions of the Act. Section 3 of the Act, 43 U.S.C. 315b, the Section applicable here, clearly provides only for revocable grazing permits. The Section shows no intent to authorize or confer any property interest in the federal lands, such as those involved here,[8] which have been established as grazing districts under the Act. And any possible doubt is dispelled by the Act's provision that "* * * the cre-

[8] See 442 F. 2d at 505; App. 34–35. The grazing permits were on land within Arizona Grazing District No. 2, established by Secretarial order 114230, dated March 6, 1936, 43 C.F.R. 502.1 (1940 ed.), and Arizona Grazing District No. 3, established by Secretarial order dated July 14, 1938, 3 Fed. Reg. 1795. See also Public Land Order 492, dated July 13, 1948, 13 Fed. Reg. 3938, which without withdrawing the lands from the grazing districts subordinates them to the Alamo project. Grazing has been permitted to continue until the lands are physically needed for the project.

ation of a grazing district or the issuance of a permit pursuant to the provisions of the subchapter, shall not create any right, title, interest or estate in or to the lands." 48 Stat. 1270, 43 U.S.C. 315b.

Accordingly, even though revocable grazing permits issued under the Act undoubtedly are of value to the permittees,[9] the courts have consistently held that the United States may revoke them without incurring liability, since the permits confer no compensable property interest in the public lands. *Osborne* v. *United States,* 145 F. 2d 892, 896 (C.A. 9); *Mollohan* v. *Gray,* 413 F. 2d 349, 353 (C.A. 9); *Sellas* v. *Kirk,* 101 F. Supp. 237, 239 (D. Nev.), affirmed, 200 F. 2d 217 (C.A. 9), certiorari denied, 345 U.S. 940; *United States* v. *Cox,* 190 F. 2d 293, 296 (C.A. 10), certiorari denied, 342 U.S. 867; *Oman* v. *United States,* 179 F. 2d 738, 741–742 (C.A. 10); *McNeil* v. *Seaton,* 281 F. 2d 931, 934 (C.A. D.C.); *Bowman* v. *Udall,* 243 F. Supp. 672, 678 (D. D.C.), affirmed *sub nom. Hinton* v. *Udall,* 364 F. 2d 676 (C.A.D.C.), certiorari denied, 385 U.S. 878; cf. *United States* v. *87.30 Acres of Land, Etc., State of Wash. (Stueckle),* 430 F. 2d 1130, 1133 (C.A. 9); *Acton* v. *United States,* 401 F. 2d 896, 899–900 (C.A. 9), certiorari denied, 393 U.S. 1121, and 395 U.S. 945.[10]

[9] The fees charged are usually well below the value of the forage. See *Public Policy and Grazing Fees on Federal Lands,* 5 Land & Water L. Rev. 303–305. See also note 14 *infra.*

[10] Even *Red Canyon Sheep Co.* v. *Ickes,* 98 F. 2d 308 (C.A. D.C.), relied upon by the majority below (App. 38), states: "We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property." *Id.* at 315. The court there held only that grazing privileges were "a proper subject of equitable protection against an illegal act." *Id.* at 315–316.

Indeed, when Congress has wished cattlemen to receive compensation for the loss of grazing permits it has expressly so provided, but even then without raising the permits to the status of property rights that are compensable under the Fifth Amendment. In 1942, Congress amended the Taylor Grazing Act and the Forest Service Act to provide for administrative compensation, set by the head of the department utilizing the land, when permits are cancelled for "war" purposes (later amended to read "defense" purposes).[11] But in providing this additional relief Congress specifically recognized that the holders of such permits were not otherwise entitled to compensation. See 88 Cong. Rec. 5594; 88 Cong. Rec. 5652; H. Rep. No. 2290, 77th Cong., 2d Sess.; *Osborne* v. *United States,* 145 F. 2d 892 (C.A. 9). The present case does not involve defense purposes.

C. *The jury in this case was improperly permitted to award compensation for the value of the public domain.* It is a general principle of the federal law of eminent domain that in determining a landowner's constitutionally guaranteed just compensation, the United States is not to be charged for values which it has created. *United States* v. *Cors,* 337 U.S. 325, 332–334; see *Shoemaker* v. *United States,* 147 U.S. 282, 303–305; *United States* v. *Miller,* 317 U.S. 369, 376–379;

[11] Act of July 9, 1942, 56 Stat. 654, as amended, 43 U.S.C. 315q.

United States v. *Reynolds,* 397 U.S. 14, 16.[12] If value was added to the respondents' land by the availability of permits to use adjacent public lands, this is a value which the government created by allowing its lands to be used without requiring payment for their full value. Thus, by expressly directing the jury to consider the availability and accessibility of 31,461 acres of the adjacent public domain land, the court invited the jury to require the government to pay for value it created. And, since that value here was entirely in the use of public lands, this was tantamount to permitting the jury to award compensation for the value of the public domain—contrary, we submit, to the doctrine of *United States* v. *Rands,* 389 U.S. 121.

In *Rands,* the question before this Court was: "Whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site." The Court held it does not. 389 U.S. at 127. The Court did not deny that access to navigable waters may enhance the market value of riparian land. *Id.* at 126. But navigable waters are the public property of the

[12] See also *United States* v. *901.89 Acres in Davidson and Rutherford Counties, Tenn.* (*Davenport*), 436 F.2d 395, 396–397 (C.A. 6), certiorari denied, 402 U.S. 973; *Cameron Development Co.* v. *United States,* 145 F.2d 209, 210 (C.A. 5); *United States* v. *Rayno,* 136 F.2d 376, 378–379 (C.A. 1), certiorari denied, 320 U.S. 776; *United States* v. *2,477.79 Acres in Bell County,* 259 F.2d 23, 27 (C.A. 5); *John L. Roper Lumber Co.* v. *United States,* 150 F.2d 329, 330–331 (C.A. 4); *Scott* v. *United States,* 146 F.2d 131, 132 (C.A. 5).

Nation, *id.* at 123, and special values which inhere in the flow of a navigable stream are thus allocable solely to the public. Accordingly, where the government itself takes riparian land (*id.* at 123–124):

> "just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, * * * it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." * * *

"To require the United States to pay for this * * * value would be to create private claims in the public domain." *Id.* at 125.

The rationale of *Rands* is fully applicable to the situation here, as the dissenting judge below recognized.[13] In both *Rands* and the present case, the likely availability of the use of the adjacent public land (or water) would undoubtedly have increased the value of the privately owned land in dealings between private individuals. The question in both cases was whether the government, in taking that private land, must pay not only the value of the land itself but also the special value added by the use of adjacent public land or water.

The court below held (442 F. 2d at 506–507; App. 36–37) that *Rands* is distinguishable because the government's navigational servitude is absolute while private rights bestowed under the Taylor Act make

[13] See also *United States* v. *Cox*, 190 F. 2d 293, 297 (C.A 10), certiorari denied, 342 U.S. 867.

the government's rights in grazing lands less absolute. But the reverse is at least equally true. The government owns its range lands as proprietor (*United States* v. *Grimaud,* 220 U.S. 506); its interest in a navigable stream is, by contrast, only quasi-proprietary. The United States does not have fee ownership of the riverbed. *Shively* v. *Bowlby,* 152 U.S. 1, 31. Fee title rests either in the state or in the riparian owner. *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 60. And riparian owners have a vested right of access to and use of navigable waters—rights which are servient only to the government's navigation servitude. *United States* v. *River Rouge Co.,* 269 U.S. 411, 417–418.

Thus, here, as in *Rands,* the question is not whether private use of public land or water is forbidden or subject to administrative and judicial protection, but, rather, whether anticipated continuance of the use of this public property is sufficiently vested to be private property for which the government is constitutionally required to pay compensation when the adjacent land is taken. In the absence of such a property right, the government should not be required to reimburse a private citizen for his loss of the use of public property, whether wet or dry. And, as previously noted (*supra,* pp. 10–11), in the Taylor Grazing Act Congress has specified that the issuance of grazing permits under that Act creates no such property right.

The court below, however, also expressed the view that compensation is owed here for the value of public

lands because there was a present use of the public asset rather than a contemplated use as in *Rands* (442 F. 2d at 507, App. 39), citing *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312. In *Monongahela* the government expropriated a lock and dam operated by a private company under Charter from the State of Pennsylvania. The Court held that the value of anticipated revenues from lawfully charged tolls as well as the value of the physical structure must be included in providing the just compensation required by the Fifth Amendment (*id.* at 341–345). The Court's decision was, however, specifically based on a finding that the company's right to collect the tolls was *not* "a mere revocable license." *Id.* at 344. Here we are concerned with mere revocable licenses. There is thus no inconsistency between *Monongahela and Rands*, or between *Monongahela* and the government's position here.

In response to our petition for certiorari, the landowners argued (Br. in Opp. 2–3) that Congress, by enacting Section 111 of the River and Harbor Act of 1970, 84 Stat. 1821, 33 U.S.C. 595a, legislatively "set aside" *United States* v. *Rands*, 389 U.S. 121, and its predecessors—and that the rationale of *Rands* should for that reason not be applied here. Stated simply, Section 595a provides that where (1) land is taken in its entirety, (2) for public use in connection with the improvement of rivers, harbors, canals, or waterways, then (3) the land is to be valued at its best use even if dependent upon access to the navigable waters in question. *Rands*, however, dealt not with what Con-

gress might agree to give as compensation, but rather with "whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site" (389 U.S. at 121). As a statement of the duty of the United States, *in the absence of a statute creating a greater duty, Rands* is still valid law. Moreover, 33 U.S.C. 595a refers only to takings for improvement of navigable rivers and waterways while *Rands,* which relied in part upon *United States* v. *Twin City Power Co.,* 350 U.S. 222, dealt with riparian takings for hydroelectric projects or any other purpose.

In the present case the taking was admittedly not under conditions governed by 33 U.S.C. 595a, nor is there any other statute under which Congress has agreed to pay more than required by the Constitution. In fact, 43 U.S.C. 315q, which provides for compensation set by the head of the Department utilizing the land when grazing permits are canceled for "national defense purposes," shows a congressional intent not to confer compensation for such rights where not taken for such purposes, *Osborne* v. *United States,* 145 F. 2d 892, 896 (C.A. 9), as does the directive of Section 315b that the issuance of a grazing "permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands."

We, of course, do not contend that Congress could not here provide for compensation beyond that required as just compensation under the Fifth

Amendment. But Congress should not by implication be held to have made gifts from the public treasury. And even where Congress has conferred a gratuity, a "further burden * * * should not be added to the gift without the use of the very plainest language." *District of Columbia* v. *Johnson*, 165 U.S. 330, 339. See, also, *Pine Hill Co.* v. *United States*, 259 U.S. 191, 196.

II

THE DECISION BELOW WOULD ENCOURAGE THE GOVERNMENT TO REVOKE GRAZING PERMITS PRIOR TO CONDEMNATION OF THE ADJOINING LAND, CONTRARY TO SOUND POLICIES OF FEDERAL LAND MANAGEMENT

The opinion below, relying on *United States* v. *Jaramillo*, 190 F.2d 300 (C.A. 10), would make the government's duty to pay a landowner for the value of access to grazing lands depend upon whether any existing permit has been revoked prior to the date of taking of his land. 442 F.2d 505–506; App. 36–37. It is apparently admitted that had the government revoked respondents' grazing permit before taking their land, it would not have been proper for the jury to consider the value of grazing rights. This would follow from *United States* v. *Cox*, 190 F. 2d 293 (C.A. 10), certiorari denied, 342 U.S. 867, and *Jaramillo* read together.

In *Cox*, decided the same day as *Jaramillo*, the government condemned a ranch comprised of fee land, state leased land and public domain land held under revocable permits, and revoked the permits coincidentally with the taking. The court held that the availabil-

ity and accessibility of public domain lands could not be considered in fixing compensation for the base land in that case. But in *Jaramillo,* the Tenth Circuit allowed the jury to consider the value of grazing permits on adjacent public lands when evaluating the fee when, unlike *Cox,* the permits had not been revoked on the date of taking.

Whether revocation occurred prior to the taking should not be controlling. The government can of course revoke grazing permits prior to or as part of a taking. Acquiring agencies, however, have found that a substantial time elapses between condemnation of land for the project and the actual need to utilize adjacent Taylor Grazing Act lands. In order to minimize economic hardship, therefore, the government generally does not revoke outstanding permits until there is an actual need to do so; this additional time may enable the government to find new grazing land for a rancher and at least allows him to continue to use his existing permit as long as possible while he makes necessary adjustments. If the government's practice in this respect is to be penalized by a substantial addition to the cost of acquiring land for public projects, the choice given to the United States would be either to disrupt the condemnee's business operations by unduly cancelling grazing permits simultaneously with the legal taking of the adjoining land, or to suffer inflated costs of acquisition by letting the permits remain in effect until the land is physically needed by the government. The attachment of these consequences to the government's choice would introduce unfortunate and essentially

extraneous considerations into federal land management and would tend to undermine the purpose of the Taylor Grazing Act to foster economic use of public lands. And, as we argue in point I, *supra,* the very existence of this choice refutes respondents' contention that anticipated use of the federal grazing lands is a compensable property right for purposes of the Fifth Amendment.

It is not without significance that the use of public lands for grazing at bargain rates represents in effect a subsidy which the cattle industry has endeavored to maintain.[14] The decision below would, in the absence of early revocation of grazing permits, in effect require a second subsidy to the cattleman at the time his land is condemned. Moreover, where less than all of the cattleman's adjoining fee land is taken, the chain of subsidy would lengthen, for the cattleman could continue to use the very range land for whose loss he has been compensated—and presumably he would again receive additional payment for the same grazing lands if part or all of his remaining base land were subsequently taken. This concatenation, we submit, confirms Congress' wisdom in declaring in the Act that a grazing permit "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b.

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[14] See *Pankey Land & Cattle Co.* v. *Hardin*, 427 F.2d 43 (C.A. 10); *One Third of the Nation's Land* (Public Land Law Review Commission, GPO, 1970), pp. 105–106, 117–118; Hearings on Grazing Fees on Public Lands before the Subcommittee on Public Lands, Committee on Interior and Insular Affairs, 91st Cong., 1st Sess., pp. 6, 115, 116–123, 139; Gates, Paul W., *History of Public Land Law Development* (1968), pp. 627, 632. See also note 9 *supra.*

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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